Supreme Court, U.S.
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No. 92-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

STATEMENT

In a vicarious liability criminal case of this nature, justice surely demands that the critical facts be fairly and squarely placed before this Court so the legal and constitutional issues presented can be correctly considered and decided. Petitioner respectfully submits that the government's brief in opposition fails in this regard. It distorts some of the most crucial facts and issues and thereby threatens to perpetuate the terrible injustice inflicted on the cooperative and its members by the erroneous decisions below.

I

THERE IS ABSOLUTELY NO BASIS FOR THE GOVERNMENT'S CONTENTION THAT "THE SHERMAN ACT CONSPIRACY CONTINUED UNTIL THE SUMMER OF 1987". THE ALLEGED CONSPIRACY PATENTLY ENDED IN MAY, 1986 WHEN THE COOPERATIVE REMOVED ELLIOTT FROM HIS POSITION. THE INDICTMENT IS THUS BARRED BY LIMITATIONS.

The petition for certiorari demonstrates that, *by May, 1986,* three of the four alleged conspirators had completely withdrawn, and the conspiracy thereupon terminated (*Petition,* pp. 24-25). *The government itself established through Elliott's own testimony that the cooperative removed him from his management position in May, 1986* (JA 352-53). Now, the government attempts to avoid the impact of the statute of limitations by erroneously asserting in its brief that Elliott served as "manager of petitioner's Marva Maid division. . .to December, 1986" (*Govt's. brief,* pp. 3,

12). The government's brief is clearly contrary to the sworn record and patently wrong.

The government next seeks to evade the statute of limitations by contending that, prior to his removal in May, 1986, "Elliott and Stamper confirmed their agreement for the 1986-1987 school year" (*Govt's. brief*, p. 12). *But at the trial, Elliott could not recall any 1986 reconfirmation agreement with Stamper* (JA 344; 350-54; 409-15). *Stamper, in turn, testified he could not "remember the contents or details" of any 1986 meeting or agreement with Elliott* (JA 186).

In any event, since Elliott was removed from his management position in May, 1986, he was powerless to execute any alleged reconfirmation agreement for the 1986-87 school year. First, he was removed before the cooperative bid on most milk supply contracts for that school year. Second, he had no involvement whatsoever in school milk deliveries and payments for milk during that school year which did not begin until the Fall of 1986, long after his removal.

Faced with these undeniable facts which establish beyond peradventure that the indictment herein is barred by the five-year statute of limitations, the government—like the Fourth Circuit—baselessly infers in its brief that possibly Mr. Neale, Elliott's successor, "continued petitioner's involvement in the conspiracy after Elliott's departure" (*Govt's. brief*, p. 12). But, as the Fourth Circuit found, Neale flatly denied any such complicity (*Pet.App.* 26a). And, Stamper, in turn, testified under oath in this case that, after Elliott was removed from his position, Neale refused to become involved. According to Stamper: "He absolutely didn't want anything to do with prices," and he sim-

ply refused to discuss school milk bids. (*Reply Brief App.*, pp.79a; 82a).

Finally, it is truly ludicrous for the government to contend that the alleged bid-rigging conspiracy continued after mid-1986, at which time the prosecutors herein commenced a massive grand jury bid-rigging investigation in Norfolk (*Reply Brief App.*, pp. 84a-87a). All of the cooperative's bid records and documents were subpoenaed, and several of its employees were summoned to testify (Id.). Even a hardened criminal would not engage in an illegal conspiracy in that kind of atmosphere! Unsurprisingly therefore, there is not a scintilla of evidence that the normally law-abiding cooperative—with Elliott removed from his position as aforesaid—did so in this case.

On this record, petitioner urges this Court to follow its decision in *Grunewald v. United States*, 353 U.S. 391, 406, 415 (1957) and rule (a) that the government failed to carry its burden of proof on the limitations issue, (b) that this prosecution is barred by the five-year statute of limitations, and (c) that the district court, *over petitioner's repeated objections*, failed correctly to charge the jury regarding the statute of limitations issue (See JA 664-70). In this regard, it is settled: "[C]riminal statutes of limitation are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *United States v. Scharton*, 285 U.S. 518 (1932). The indictment herein should thus be dismissed.

II

EQUALLY SPECIOUS IS THE GOVERNMENT'S CONTENTION THAT IT DID NOT ENGAGE IN EXTRAORDINARY, UNCONSTITUTIONAL PREINDICTMENT DELAY.

Stale claims have never been favored by the law, and far less in criminal cases." *Dickey v. Florida*, 398 U.S. 30, 37 (1970). As reemphasized in I *supra*, the indictment in this case was actually barred by the statute of limitations, which is the primary guarantee against the prosecution of stale criminal charges. *United States v. Ewell*, 383 U.S. 118, 122 (1966); *United States v. Marion*, 404 U.S. 307, 322-23 (1971). The government's brief, however, reinforces petitioner's claim that the indictment also should have been dismissed for unconstitutional preindictment delay.

The government, which waited—(1) more than seven years after Elliott's alleged basic Sherman Act violation in 1984 and (2) more than four years after the disgruntled Elliott came to the prosecutors in April, 1987 and volunteered a series of bid-rigging charges—to indict the cooperative on July 30, 1991, now speciously contends that the prosecutors "*diligently prosecuted the case*," but they were "*hampered by the initial false denials of any bid-rigging on the part of Elliott.*" Thus, the government alleges in its brief that *the prosecutors had to wait more than four years for "Elliott's 180-degree turn" before they could indict the cooperative.* (*Govt's. Brief*, pp. 5-6; 8).

The government's contention is truly incredible. Indeed, the prosecutors' own memorandum of January 27, 1988 demonstrates that this belated contention is

baseless (*Pet.App.* 63a-65a). Elliott was fully available to the prosecutors in 1987; he was entirely cooperative; he proffered bid-rigging charges against the cooperative in an effort to gain the cooperative's indictment; he wanted to get even with both the cooperative and his successor, Neale, for his discharge; and he identified several witnesses who would allegedly support his testimony (*Pet.App.* 64a). *The prosecutors responded by "closing the investigation" in January 1988* (*Pet.App.* 65a).

The government thereupon put the cooperative "on the back burner" for $3^1/_2$ years. The prosecutors literally did nothing to investigate or prosecute until 1991 when they apparently revisited Elliott and decided to indict even though the statute of limitations had expired. *As a result, the cooperative—indicted for crimes Elliott allegedly committed years ago—was left to defend itself without Elliott (who was working with the government), without Elliott's personal bid computations, bid memoranda, correspondence, etc., and without its own bid files which were innocently discarded after the prosecutors closed the aforesaid investigation in 1988.* Under these circumstances, the indictment must be dismissed for unconstitutional preindictment delay. *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S.Ct. 590 (1990); *United States v. Richburg*, 478 F.Supp. 535 (M.D.Tenn. 1978); *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983).

III

THE GOVERNMENT'S SUPPRESSION OF IMPEACHMENT AND CREDIBILITY EVIDENCE REGARDING ELLIOTT'S PERSONAL STAKE IN THE OUTCOME OF THIS CASE, AND OF THE FACT THAT HE WORKED CLOSELY WITH THE PROSECUTORS, DEPRIVED PETITIONER OF A FAIR TRIAL IN THIS VICARIOUS LIABILITY CASE BASED ON ELLIOTT'S OWN ALLEGED CRIMES. THE SUPPRESSION OF THAT EVIDENCE ALSO PREVENTED THE LOWER COURTS FROM CONDUCTING MEANINGFUL IN CAMERA INSPECTIONS OF THE ELLIOTT INTERVIEW NOTES.

The government's brief represents that the prosecutors met their *Brady* obligation by "providing *all* the exculpatory and impeachment evidence [they] possessed" (*Govt's. brief,* p. 6). That statement is untrue. The only *Brady* material the prosecutors produced was their *own* statement that, in April, 1987, Elliott allegedly denied any knowledge of bid-rigging (*Pet.App.* 66a).

But, throughout the trial and the appeal proceedings in the Fourth Circuit, the prosecutors suppressed the additional impeachment and credibility evidence contained in their own memorandum of January 27, 1988 (*Pet.App.* 63a-65a). *They suppressed the fact that Elliott, for whose crimes the cooperative was vicariously convicted, had a personal stake in the outcome of this case, to wit, he wanted to punish the cooperative and his successor, Neale, for his 1986 discharge* (*Pet.App.* 64a). *They suppressed the fact that, instead of flatly denying knowledge of bid-rigging in 1987, Elliott actually proffered a series of alleged bid-rigging charges against the cooperative and Mr. Neale.* (*Pet.App.* 64a). And, they suppressed the fact that

the prosecutors investigated Elliott's 1987 charges against the cooperative and found them to be unsupportable. (*Pet.App.* 64a, 65a). As a result, the Fourth Circuit was misled and erroneously ruled (*Pet.App.* 18a):

> "This is neither a case in which the key government witnesses had a personal stake in the outcome of the litigation which was not disclosed, *see Giglio*, 405 U.S. at 154-55. . .; *Bagley*, 473 U.S. at 683. . ., nor one where the government withheld evidence "so supportive of a claim of innocence that it [gave] the prosecution notice of a duty to produce." *Agurs*, 427 U.S. at 107. This is a case where the government met its obligation under *Brady* by providing all of the exculpatory and impeachment evidence it possessed. . . ."[1]

Furthermore, the prosecutors' suppression of the aforesaid impeachment and credibility evidence plainly prevented the district court and the Fourth Circuit from conducting meaningful, fully intelligent *in camera* inspections of the Elliott interview notes.

Without any knowledge of the fact Elliott had a personal stake in the outcome of this case, and of the fact Elliott was voluntarily working with the prosecutors to gain the cooperative's indictment and conviction for crimes Elliott himself secretly committed,

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[1] The prosecutors did *not* produce their memorandum of January 27, 1988 in the lower courts in this case. Rather, they produced it in 1992 in a related case, *United States v. Hughes*, wherein the defendant was acquitted. The memorandum was not brought to the Fourth Circuit's attention until *after* it rendered its opinion on September 15, 1992.

how could the lower courts have possibly appreciated or fully understood the true nature and significance of any additional *impeachment* or *credibility* evidence contained in the prosecutors' Elliott interview notes? Moreover, without the suppressed facts now disclosed by the prosecutors' memorandum of January 27, 1988, how could the courts below have possibly correctly analyzed the contents of those notes to determine why, in light of Elliott's proffered cooperation, it was necessary for the prosecutors to interrogate him for more than 90 hours, and to grant him immunity from prosecution on four separate occasions, before he would testify against the cooperative? (*Pet.App.* 63a-65a; 68a-75a).

Consequently, petitioner submits the petition for certiorari should be granted and petitioner's conviction reversed on constitutional grounds in line with this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1978) and *United States v. Bagley*, 473 U.S. 667 (1985). In view of the government's admission, at p. 11 n.4 of its brief, that the Elliott interview notes were voluntarily produced by the government without objection in the related case (*United States v. Hughes*) and Mr. Hughes' acquittal in that case, the production of those same notes in this case is obviously long overdue.

At the very least, the petition should be granted to determine what relief is appropriate under the aforesaid circumstances in light of this Court's decision in *Goldberg v. United States*, 425 U.S. 84, 108-111 (1976); *Campbell v. United States*, 373 U.S. 487 (1963) and the Jencks Act, 18 U.S.C. 3500. Petitioner submits that since the suppressed factual information

contained in the prosecutors' memorandum of January 27, 1988 has now been exposed, and since the prosecutors themselves voluntarily produced their Elliott interview notes in *Hughes*, the judgment below should be vacated by this Court, the government should be ordered to release the suppressed notes in this case, and this Court should order a new trial without the necessity for further preliminary proceedings in the courts below (See *Goldberg*, at pp. 111, 112; *Clancy v. United States*, 365 U.S. 312 (1961)).

IV

THE FINE IMPOSED ON THE COOPERATIVE WAS EXCESSIVE, AN ABUSE OF THE LOWER COURTS' DISCRETION, AND VIOLATIVE OF PETITIONER'S RIGHTS UNDER THE FIFTH AND EIGHTH AMENDMENTS.

At p. 7, n.1 of its brief, the government suggests that the "propriety of the sentence" in this case is possibly of no further interest to the cooperative and its farmer members. That suggestion is plainly incorrect.

The cooperative, a first offender with no prior criminal record, was fined $1,100,000 for Elliott's offenses by the district court. As a result of the conviction, it was automatically suspended as a government contractor and lost approximately $10,000,000 in federal military milk sales. The cooperative was thereupon subjected to further crushing losses in a follow-up treble-damage civil antitrust action filed by the Attorney General of Virginia in the same district court in Norfolk. The Attorney General contended that, under Section 5 of the Clayton Antitrust Act, as amended, 15 U.S.C. 16(a), the final judgment in this

criminal antitrust case is *prima facie* evidence of the cooperative's liability in her follow-up civil action. These multiple losses, of course, must be borne by the cooperative's completely innocent farmer members, many of whom were either not members when Elliott committed the alleged Sherman Act violation or are not presently members of the cooperative today. This, of course, is an additional reason why correct application of the statute of limitations and/or the doctrine of preindictment delay is so imperative in this vicarious liability criminal case.

Space limitations make it impossible for petitioner to discuss all of the legal and constitutional reasons why the fine and related losses imposed on the cooperative and its members in this case should be reviewed and set aside. Thus, petitioner directs the Court's attention to the discussions of those issues contained in the amicus curiae briefs filed herein by the National Council of Farmer Cooperatives and the National Milk Producers Federation.

CONCLUSION

Petitioner reiterates that the petition for a writ of certiorari herein should be granted.

Respectfully Submitted:

EDWARD L. MERRIGAN
JONES, WALKER, WAECHTER, POITEVENT,
CARRÈRE & DENÈGRE

Counsel of Record for Petitioner

February 25, 1993

APPENDIX

REPLY BRIEF APPENDIX
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Excerpt from testimony of Douglas H. Stamper on January 29, 1991 before the grand jury in this case sitting in the United States District Court for the Eastern District of Virginia (Norfolk Div.) 79a,80a

Excerpt from testimony of Douglas H. Stamper on April 29, 1992 in the closely-related case, *Commonwealth of Virginia by its Attorney General, etc. v. Land-O-Sun Dairies, Inc. et al.*, C/A No. 91-510-N, U.S. District Court for the Eastern District of Virginia (Norfolk Division) 81a-83a

Prosecutors' covering letter and *subpoena duces tecum* of July 14, 1986 addressed to petitioner, Maryland and Virginia Milk Producers Cooperative Association, Inc., in grand jury investigation conducted by the prosecutors in the United States District Court for the Eastern District of Virginia (Norfolk Division) 84a-87a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA
v.
JOHN DOE

TESTIMONY OF DOUGLAS H. STAMPER

Norfolk, Virginia
January 29, 1991

Before:

THE UNITED STATES GRAND JURY

Appearances:

DAVID C. JORDAN, ESQUIRE
PHILIP J. BURI, ESQUIRE
United States Department of Justice,
Antitrust Division

* * *

[66] A. Yes, sir, in Newport News. Again, I'm not sure if that's Newport News or Hampton. But it's on Jefferson Avenue.

And we met—it seems like it may have been the afternoon—I can't be sure if it was morning or afternoon—but for coffee and talked about his coming back and Charles being gone, and I do recall that he made the statement that he absolutely didn't want anything to do with pricing.

Q. Is it your best recollection that Mr. Elliott was gone at the time that this meeting occurred, he had already left the company?

A. The way I recall it, Elliott was already gone.

Q. And at that time do you recall whether you were aware of the antitrust investigation that was going on in the milk industry at that time?

A. Yes. I was aware of it.

Q. Was there any reference made to that investigation that you can remember?

A. I don't recall. I cannot say there wasn't. But I don't recall us discussing it.

Q. Did you interpret—did you

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 91-510-N

COMMONWEALTH OF VIRGINIA,
by its Attorney General, etc.,

Plaintiff,

V.

LAND-O-SUN DAIRIES, INC.,
MAOLA MILK & ICE CREAM COMPANY, INC.,
THE SOUTHLAND CORPORATION,
MARYLAND AND VIRGINIA MILK PRODUCERS
COOPERATIVE ASSOCIATION, INC.,
t/a MARVA MAID DAIRY,

Defendants.

DEPOSITION UPON ORAL EXAMINATION
OF DOUGLAS HOWARD STAMPER,
TAKEN ON BEHALF OF THE DEFENDANTS

Virginia Beach, Virginia
April 29, 1992
VOLUME I

Appearances:

MILTON A. MARQUIS, ESQUIRE
DAVID B. IRVIN, ESQUIRE
Assistant Attorneys General
Counsel for the Plaintiff

* * *

[62] a conversation with Thomas Neale of Marva Maid?

A. Yes, sir.

Q. Was that after Mr. Elliott had been demoted by Marva Maid?

A. Again, I really didn't know he was demoted. I took it to be after he was gone, but I don't know.

Q. Let me ask you this: Do you recall a certain time that Mr. Elliott was no longer responsible for school bids for Marva Maid, that Mr. Neale had taken that responsibility?

A. Yes.

Q. And during this time, you don't know whether Mr. Elliott had been discharged and was gone from Marva Maid, or merely had been demoted and was still at Marva Maid but just not dealing with the schools anymore, you don't know which; is that right?

A. I don't know. Like I said, I had the impression that he was gone, but I don't know.

Q. When you had a meeting with Mr. Neale did he tell you at that meeting he did not want to discuss anything about school milk prices?

A. Any pricing.

Q. Any prices?

A. Any prices.

Q. So I take it you—at that meeting you [63] didn't come to any agreement with Mr. Neale about anything about school milk bids, did you?

A. No, sir.

Q. At that meeting did you try to talk to Mr. Neale about prices?

A. No, sir.

Q. He just announced to you, "Look, I don't want to talk about prices"; is that right?

A. That's the way I remember it.

Q. What was the meeting about with Mr. Neale?

A. As I recall, he called me and wanted to meet with me, that they were having some management changes, that's the reason I think it was when Elliott left and that he was in charge then.

Q. He just wanted to let you know that Mr. Elliott was leaving?

A. That's the way I remember it.

Q. That's the substance of the meeting?

A. Yes, sir. And that he was back in operation, the way I understood it, that Mr. Neale had left or was temporarily out of the picture, to some degree anyway.

Q. More or less a professional courtesy type of a call?

A. Well, I didn't know he knew that, but I knew

* * *

U.S. Department of Justice
Antitrust Division
Office of the Deputy Assistant Attorney General *Washington, D.C. 20530*

AVN:GK
60-9-272

July 14, 1986

Maryland & Virginia Milk Producers
Cooperative Association, Inc.
Marva Maid Division
P.O. Box 5145
Newport News, VA 23605-0145

Re: Grand Jury Investigation—Milk—
Eastern District of Virginia, Norfolk

Dear Sir or Madam:

Pursuant to a grand jury investigation into possible criminal violations of federal antitrust laws, your company is required to furnish all documents responsive to the enclosed subpoena. As stated in this subpoena, compliance is scheduled for August 13, 1986, before a grand jury sitting in Norfolk, Virginia. Your company's custodian should be prepared at that time to testify as to the identity of the documents produced and the persons who conducted the search, the extent of the search, and the identity and location of the files from where the documents were retrieved.

In lieu of personally producing documents before the grand jury, the company may, at its option, comply with the subpoena by sending the documents to the Antitrust Division's offices in Washington, D.C. If the company elects to comply by mail, it must follow the procedure set forth below:

(1) The officer responsible for complying with the subpoena must execute the enclosed affidavit before a notary public. This affidavit must accompany the documents being forwarded.

(2) An index, list or other summary identifying the documents produced, who conducted the search, the files searched, and the files from where the documents were retrieved also must accompany the documents.

(3) The documents must be forwarded to the undersigned at the following address on or before August 13, 1986, the return date of the subpoena:

Gail Kursh, Esquire
U.S. Department of Justice
Antitrust Division, Room 3237
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Please advise me on or before August 8, 1986, if the company elects to produce the documents personally so that suitable arrangements can be made with the grand jury. You may contact me at (202) 633-2495.

Thank you for your cooperation.

Sincerely yours,

/s/ Gail Kursh
Gail Kursh
Attorney
Antitrust Division

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

John Doe #86-044

SUBPOENA TO TESTIFY BEFORE GRAND JURY

To: Maryland & Virginia Milk Producers
Cooperative Association, Inc.
Marva Maid Division
P.O. Box 5145
Newport News, VA 23605-0145

☐ Person
■ Document or Object

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

Place: Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Date and Time: August 13, 1986, 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

See attached schedule

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

---

[1] If not applicable, enter "none."

Clerk

G. Ray Old, Acting Clerk

(By) Deputy Clerk

Margaret C. Clifford

Date

July 16, 1986

This subpoena is issued on application of the United States of America by:

Gail Kursh

/s/ Gail Kursh

Name, Address and Phone Number of Assistant U.S. Attorney

Gail Kursh, Attorney
U.S. Department of Justice, Rm. 3237
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 633-2495